IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.1818 OF 2004
IN
SUMMARY SUIT NO.3242 OF 2004

Pacific Refractories Ltd. ..Plaintiff.

Vs.

Stein Heurtey India Projects
Pvt. Ltd. ..Defendant.

Mr.O.S.Kutty for the Plaintiff.

Mr.Virag Tulzapurkar with Mr.A.S.Doctor i/b.M/s.Junnarkar & Associates for the Defendant.

CORAM : S.J. VAZIFDAR, J.
DATED : 10TH FEBRUARY, 2006

ORAL JUDGMENT :

The Defendant has taken out this Chamber Summons for revocation of the leave granted by me by an order dated 26.10.2005 under Clause XII of the Letters Patent to file the present suit against the Defendant in this Court.

2. The suit is filed to recover a sum of Rs.28,61,938/- together with interest at 18% per annum from the date of filing of the suit till realisation for the goods sold and delivered by the Plaintiff to the Defendant. The Plaintiff raised invoices in respect of the said sales. The supply

however was made pursuant to a contract entered into between the Plaintiff and the Defendant as pleaded in paragraphs 3 and 4 of the plaint.

3. Neither counsel made an application to lead evidence. Mr.Kutty, the learned counsel appearing on behalf of the Plaintiff, confined his submissions in support of his case that the leave was granted correctly only on the basis of the contract having allegedly been entered into in Bombay. Mr.Tulzapurkar, the learned Senior counsel appearing on behalf of the Defendant, in support of his contention that the leave granted ought to be revoked, submitted that the contract had been entered into in Calcutta. He further submitted that in any event, in view of Article 39 of the contract, the leave granted ought to be revoked.

4. Two questions therefore fall for consideration. Where was the contract entered into for the purpose of determining territorial jurisdiction ? Does Article 39 of the contract require the parties to adopt legal proceedings only in the Calcutta High Court to the exclusion of all other Courts ?

5. The question regarding the place where the

contract was entered into, involves a consideration of the pleading in paragraphs 3 and 4 of the plaint. As there was some difficulty in construing the pleading, I find it convenient to set out in extenso paragraph 3 and 4, which read as under :

> "3. The Plaintiff states that pursuant to an Enquiry No.116/ENQ/F2/02 dated 30-04-2003, floated by the Defendant, the Plaintiff submitted an offer No.PRL/AC/Q/0286 dated 11-07-2003, PRL/DSV/723/03 & PRL/DSV/724/03, both dated 7-08-2003, for supply of Insulating Bricks, Mica Bricks & Mortars. The Plaintiff craves leave to rely upon the aforesaid enquiry and the offers submitted, as and when produced.
>
> 4. The Plaintiff states that based on the aforesaid offers submitted by the Plaintiff, a Contract No.116/209.0/F2 came to be entered into between the Plaintiff and the Defendant for supply of Insulating Bricks, Mica Bricks & Mortars, against Purchase Order No.116/209.0/F2 dated 8-08-2003. Annexed hereto marked Exhibit 'A' is a copy of the said Purchase Order being L.O.I. dated 8-8-2003. The Purchase Order and contract was sent by Defendant from Kolkata, with a forwarding letter Ref.No.116/209.0/F2/01 dated 22-10-2003 to the Plaintiff at Mumbai. Upon receipt of the forwarding letter along with the contract on 25-10-2003, the Plaintiff accepted the said contract at Mumbai. In token

> having accepted the said contract, the Plaintiff signed the same at Mumbai and returned back the Original to the Defendant, as demanded. Therefore, it is pertinent to note that the contract was accepted and concluded by the Plaintiff at Mumbai. Annexed hereto and marked Exhibit-‘B’ & ‘C’ are the copies of the ‘Forwarding letter’ Ref.No.116/209.0/F2/01 dated 22-10-2003 and the underlying Contract executed at Mumbai, respectively."

6. Paragraph 3 merely refers to an enquiry made by the Defendants and an offer made by the Plaintiff pursuant thereto. As per the pleading, the enquiry was made by the Defendant from Calcutta in writing by post and the offer was also communicated by post by the Plaintiff from Bombay.

7. The first sentence in paragraph 4 merely states that based on the aforesaid offer, meaning thereby, the offer referred to in paragraph 3, a contract came to be entered into between the Plaintiff and the Defendant. Now, the offer was made from Bombay by post. In the plaint, the Plaintiff does not state how a contract "......came to be entered into......" to wit, the Plaintiff does not state the mode of communication of the acceptance of the

Plaintiff's offer by the Defendant. It is not the Plaintiff's case that the offer was accepted telephonically or by any other mode of instantaneous communication. Nor is it the Plaintiff's case that the Defendant accepted the offer in Bombay. In fact, it is admitted that the contract, Exhibit "C" to the plaint, was signed by the Defendant in Calcutta. It is further admitted that the contract itself was forwarded by post. In the circumstances, it is clear that the contract was accepted by the Defendant in Calcutta and the acceptance was put into a course of transmission by the Defendant by posting the same to the Plaintiff in Bombay.

8. It is settled law that when an offer is accepted by post, the contract is complete when the acceptance is put into a course of transmission by posting the letter. In *Bhagwandas Goverdhandas Kedia v. M/s.Girdharlal Purshottamdas & Co., AIR 1966 Supreme Court, 543*, a three Judge Bench of the Supreme Court dealt in detail with the question as to where a contract is considered to have been made. The Supreme Court made a distinction between contracts entered into through the intervention of the postal authorities and contracts entered into by instantaneous communication eg. by telephone. In

paragraphs 7 and 8 the Supreme Court, on a consideration of the provisions of the Indian Contract Act, held that a contract becomes complete as soon as the acceptance is made by the acceptor and when the acceptance of the offer is communicated to the offeror. It was held that acceptance and intimation of acceptance of offer are therefore both necessary to result in a binding contract. However, the Supreme Court further held that on this rule is engrafted an exception when a contract is made by letters sent by post. The Supreme Court inter-alia held as under :

> "(8) .....
> But on this rule is engrafted an exception based on grounds of convenience which has the merit not of logic or principle in support, but of long acceptance by judicial decisions. If the parties are not in the presence of each other, and the offeror has not prescribed a communication of acceptance, insistence upon communication of acceptance of the offer by the offeree would be found to be inconvenient, when the contract is made by letters sent by post.
> .....
> .....
> When by agreement, course of conduct, or usage of trade, acceptance by post or telegram is authorised, the bargain is struck and the contract is complete when the acceptance is put into a course of transmission by the

offeree by posting a letter or dispatching a telegram."

9. In *A.B.C. Laminart Pvt. Ltd. & Anr. v. A.P. Agencies, Salem, AIR (1989) 2 SCC, 163,* a two Judge Bench of the Supreme Court held as under :

"**15.** In the matter of a contract there may arise causes of action of various kinds. In a suit for damages for breach of contract the cause of action consists of the making of the contract, and of its breach, so that the suit may be filed either at the place where the contract was made or at the place where it should have been performed and the breach occurred. The making of the contract is part of the cause of action. A suit on a contract, therefore, can be filed at the place where it was made. The determination of the place where the contract was made is part of the law of contract. But making of an offer on a particular place does not form cause of action in a suit for damages for breach of contract. Ordinarily, acceptance of an offer and its intimation result in a contract and hence a suit can be filed in a court within whose jurisdiction the acceptance was communicated. The performance of a contract is part of cause of action and a suit in respect of the breach can always be filed at the place where the contract should have (been) performed or its performance completed. If the contract is to be performed at the place where it is made, the suit on the contract is to be filed there and

> nowhere else." (emphasis supplied)

The above observations are not contrary to the ratio of the judgment of the three Judge Bench of the Supreme Court in *Bhagwandas Goverdhandas Kedia v. M/s.Girdharlal Purshottamdas & Co.* The word "Ordinarily" in the above extract makes this clear. In *A.B.C. Laminart Pvt. Ltd. & Anr. v. A.P. Agencies, Salem,* the Supreme Court merely held that "ordinarily" a contract is made only upon communication of its acceptance. The Supreme Court did not deal with the exception to this rule laid down in *Bhagwandas Goverdhandas Kedia v. M/s.Girdharlal Purshottamdas & Co.* The exception applies when a contract is made by letters, exchanged through post.

10. In the circumstances, based solely on the pleadings in paragraphs 3 and 4, it must be held that the contract was made in Calcutta.

11. I will now consider the matter on the basis of the documents annexed to the plaint.

12. Exhibit "A" is a letter dated 8.8.2003 addressed by the Defendant to the Plaintiff stating, "We intend to place an order on you for supply of ....." The letter ends by the Defendant, asking the Plaintiff to send their formal acceptance, "along with detailed item wise price break up and despatch schedule for issuing the Formal Contract/Purchase order." The letter was therefore an invitation to offer by the Defendant to the Plaintiff.

13. There is a gap in the correspondence as annexed, for Exhibit "B" to the plaint is a letter dated 22.10.2003 addressed by the Defendant to the Plaintiff, enclosing the original contract signed by them and requesting the Plaintiff to sign and return a copy for the Defendant’s record. Obviously, between the invitation to offer contained in the letter dated 8.8.2003 (Exhibit "A" to the plaint) and the letter dated 22.10.2003 (Exhibit "B" to the plaint) must have been an offer. This could not have been the offer dated 11.7.2003 or the offer dated 7.8.2003 referred to in paragraph 3 of the plaint for they were prior to the letter dated 8.8.2003.

14. Thus, the offer was obviously between 8.8.2003, and 22.10.2003. The same was accepted by the Defendant's letter dated 22.10.2003 in Calcutta and posted from there to the Plaintiff in Bombay. In view of the judgment of the Supreme Court in *Bhagwandas Goverdhandas*, it must be held that the contract in that case would also be deemed to have been made in Calcutta.

15. Let me look at the matter differently. The letter dated 8.8.2003 refers to the Plaintiff's letter dated 7.8.2003 at item 3 of the reference to the letter. This is the offer referred to in paragraph 3 of the plaint. Even if the letter dated 8.8.2003 is deemed to be an acceptance of that offer, it would not be of any assistance to the Plaintiff, for the acceptance, was made in Calcutta. The letter dated 8.8.2003 accepting the offer made by the Plaintiff's letter dated 7.8.2003 was posted from Calcutta, after having been accepted in Calcutta. Once again, on the basis of the judgment of the Supreme Court in *Bhagwandas's* case, the contract must be deemed to have been made in Calcutta.

16. In the circumstances, whichever way we consider

the pleadings or the correspondence, it must be held that the contract was made in Calcutta and not in Bombay. This probably explains the draftsmans reluctance to plead how the offer was made and how, as opposed to where, it was accepted. The pleading merely states that the offer was accepted in Bombay.

17. There is yet another reason why it must be held that the contract was made in Calcutta and not in Bombay. We have seen earlier that the normal rule is that the acceptance and the intimation of acceptance of offer, are both necessary to result in a binding contract. We have also seen that the Supreme Court in *Bhagwandas Goverdhandas Kedia v. M/s.Girdharlal Purshottamdas & Co.*, held that to this normal rule is an exception, the exception being that when by agreement, acceptance by post is authorised, the contract is complete when the acceptance is put into a course of transmission by the offeree by posting the letter. There is however a caveat to this exception.

18. Even where the acceptance of an offer by post is authorised, the acceptance would be complete at the place where the communication of the acceptance is received, if the parties required the

communication of acceptance to be intimated. This is clear from the following observations of the Supreme Court in *Bhagwandas Goverdhandas Kedia v. M/s.Girdharlal Purshottamdas & Co.*, which though a part of paragraph 8 extracted above, I find convenient to reproduce again here :

> (8) .....
> "If the parties are not in the presence of each other, and the offeror has not prescribed a mode of communication of acceptance, insistence upon communication of acceptance of the offer by the offeree would be found to be inconvenient, when the contract is made by letters sent by post....."
> (emphasis supplied)

It will be clear from the above observation that the exception operates only when the parties have not prescribed the mode of communication of acceptance.

19. This is, in fact, also the view in England. Mr.Tulzapurkar, relied upon the judgment of the Court of Appeal in *Holwell Securities Ltd. v. Hughes, (1974)1 All ER, 161*. The following observations of the Court of Appeal indicate the exception and the qualification to this exception

which I have mentioned :-

> "The plaintiff's main contention below and before this court has been that the option was exercised and the contract for sale and purchase was constituted at the moment that the letter addressed to the defendant with its enclosure was committed by the plaintiffs' solicitors to the proper representative of the postal service, so that its failure to reach its destination is irrelevant.
>
> It is the law in the first place that prima facie acceptance of an offer must be communicated to the offeror. On the principle the law has engrafted a doctrine that, if in any given case the true view is that the parties contemplated that the postal service might be used for the purpose of forwarding an acceptance of the offer, committal of the acceptance in a regular manner to the postal service will be acceptance of the offer so as to constitute a contract, even if the letter goes astray and is lost. Nor, as was once suggested, are such cases limited to cases in which the offer has been made by post. It suffices I think at this stage to refer to *Henthorn v. Fraser*. In the present case, as I read a passage in the judgment below, Templeman concluded that the parties have contemplated that the postal service might be used to communicate acceptance of the offer (by exercise of the option); and I agree with that.
>
> But that is not and cannot be the end of the matter. In any

> case, before one can find that the basic principle of the need for communication of acceptance to the offeror is displaced by this artificial concept of communication by the act of posting, it is necessary that the offer is in its terms consistent with such displacement and not one which by its terms points rather in the direction of actual communication. We were referred to Henthorn v Fraser and to the obiter dicta of Farwell in Bruner v Moore, which latter was a case of an option to purchase patent rights. But in neither of those cases was there apparently any language in the offer directed to the manner of acceptance of the offer or exercise of the option.
>
> The relevant language here is, 'THE said option shall be exercisable by notice in writing to the Intending Vendor...', a very common phrase in an option agreement. There is, of course, nothing in that phrase to suggest that the notification to the defendant could not be made by post. But the requirement of notice... to', in my judgment, is language which should be taken expressly to assert the ordinary situation in law that acceptance requires to be communicated or notified to the offeror, and is inconsistent with the theory that acceptance can be constituted by the act of posting, referred to by Anson as 'acceptance without notification'." (emphasis supplied)

20. The qualification to the exception operates in the present case. In the present case, the

communication of the acceptance was required to be made. The communication of the acceptance was, in fact, made. The communication of the acceptance was required to be made in Calcutta and was, in fact, made in Calcutta. Firstly, the Plaintiff has admitted the same in paragraph 4 of the plaint which I have extracted above. The relevant averment is :-

> "..... in token of having accepted the said contract, the Plaintiff signed the same at Mumbai and returned back the original to the Defendant, as demanded....." (emphasis supplied)

21. It was not contended by Mr.Kutty that this was an error in drafting. In fact, it was not an error. The contract itself mandated the communication of the acceptance. Article 5 of the contract which makes this clear, reads as under :-

> "**ARTICLE 5 - CORRESPONDENCE :**
>
> The Supplier shall return the Acceptance Copy of the Contract duly signed signifying acceptance of the Contract within seven days of the Contract. All information concerning supplier's Contract Number, relevant reference to various work shall be submitted to

> the Purchaser." (emphasis supplied)

Article 5 did not require a copy of the contract to be forwarded merely for the Defendant's record. It required the contract to be forwarded in order to signify the acceptance of the contract. The stipulation was not an empty or idle formality.

22. Admittedly, the signed contract signifying acceptance was forwarded to the Defendant in Calcutta. This was in accordance with Article 43 of the contract which required all communication to be addressed to the Managing Director of the Defendant in Calcutta.

23. Mr.Tulzapurkar's submission that no part of the cause of action arose in Mumbai is therefore well founded. The leave granted under Clause XII of the Letters Patent is liable to be revoked on this ground alone.

24. In the above circumstances, the mere fact that a solitary sentence in paragraph 4 of the affidavit in support of the Chamber Summons to the effect that admittedly, only a part of the cause of action in

the suit has arisen in Mumbai, is of no consequence. This statement was made in the context of the Defendant's contention that in view of Article 39 of the contract only the Calcutta High Court would have jurisdiction. The admission referred to by the Defendant therefore was qua the Plaintiff and not the Defendant. In any event this being a question of law an averment by the parties cannot be decisive of the matter.

25. This brings to Mr.Tulzapurkar's second submission, based on Article 39 of the contract, which reads as under :

> **ARTICLE 39 - GOVERNING LAW AND JURISDICTION** :
>
> All legal actions or suits arising out of, or in connection with this Contract or the subject matter thereof shall govern by Indian Laws and under the jurisdiction of Calcutta High Court."

26. A similar and in material particulars an almost identical clause, fell for the consideration of the Supreme Court in *Angile Insulations v. Davy Ashmore India Ltd., (1995) 4 SCC 153,* where the Supreme Court held as under :

"5. So, normally that court also would have jurisdiction where the cause of action, wholly or in part, arises. But it will be subject to the terms of the contract between the parties. In this case, clause (21) reads thus:

"This work order is issued subject to the jurisdiction of the High Court situated in Bangalore in the State of Karnataka. Any legal proceeding will, therefore, fall within the jurisdiction of the above court only."

A reading of this clause would clearly indicate that the work order issued by the appellant will be subject to the jurisdiction of the High Court situated in Bangalore in the State of Karnataka. Any legal proceeding will, therefore, be instituted in a Court of competent jurisdiction within the jurisdiction of High Court of Bangalore only. The controversy has been considered by this Court in A.B.C. Laminart (P) Ltd. v. A.P. Agencies, (1989) 2 SCC 163 : (AIR 1989 SC 1239). Considering the entire case law on the topic, this Court held that the citizen has the right to have his legal position determined by the ordinary Tribunal except, of course, subject to contract (a) when there is an arbitration clause which is valid and binding under the law, and (b) when parties to a contract agree as to the jurisdiction to which dispute in respect of the contract shall be subject. This is clear from Section 28 of the Contract Act.

But an agreement to oust absolutely the jurisdiction of the court will be unlawful and void being against the public policy under Section 23 of the Contract Act. We do not find any such invalidity of clause (21) of the contract pleaded in this case. On the other hand, this Court laid that where there may be two or more competent courts which can entertain a suit consequent upon a part of the cause of action having arisen therewith, if the parties to the contract agreed to vest jurisdiction in one such court to try the dispute which might arise as between themselves, the agreement would be valid. If such a contract is clear, unambiguous and explicit and not vague, it is not hit by Sections 23 and 28 of the Contract Act. This cannot be understood as parties contacting against the statute. Mercantile law and practice permit such agreements.

6. In this view of the law and in view of the fact that the agreement under which clause (21) was incorporated as one such clause, the parties are bound by the contract. The contract had not been pleaded to be void and being opposed to Section 23 of the contract Act. As seen, clause (21) is unambiguous and explicit and that, therefore, the parties having agreed to vest the jurisdiction of the court situated within the territorial limit of High Court of Karnataka, the Court of Subordinate Judge, Dhanbad in Bihar State has no jurisdiction to entertain the suit laid by the appellant. Therefore, the High Court was right in upholding the order of the trial court returning the

> plaint for presentation to the proper court." (emphasis supplied)

27. Mr.Tulzapurkar's reliance upon the judgment is well founded. The judgment, to my mind, virtually concludes the matter in the Defendant's favour. There really is no difference in substance between Article 39 and the clause construed by the Supreme Court. It must be held that Article 39 is unambiguous and explicit and that therefore the parties having agreed to vest the jurisdiction in the Courts within the territorial limit of the Calcutta High Court, this Court has no jurisdiction to entertain this suit.

28. Mr.Kutty, however, submitted that properly construed, the clause did not oust the jurisdiction of all other Courts including of this Court. In other words, according to him, the clause properly construed, did not confer jurisdiction only upon the Calcutta High Court and upon no other Court. He based this submission in view of the fact that words such as "only", "alone" or "exclusive" did not prefix the words "under the jurisdiction of the Calcutta High Court. I have already held, on the basis of the judgment of the Supreme Court in *M/s.*

Angile Insulations (supra) that Article 39 is unambigous. I will however in the rest of this judgment, while dealing with Mr.Kutty's submission, proceed on the basis that Article 39 is not unambiguous.

29. In support of his submission, Mr.Kutty relied upon paragraphs 20, 21 and 22 of the judgment in *A.B.C. Laminart Pvt. Ltd. & Anr. v. A.P. Agencies, Salem (supra)* which read as under :

> "20. When the Court has to decide the question of jurisdiction pursuant to an ouster clause it is necessary to construe the ousting expression or clause properly. Often the stipulation is that the contract shall be deemed to have been made at a particular place. This would provide the connecting factor for jurisdiction to the courts of that place in the matter of any dispute on or arising out of that contract. It would not, however, ipso facto take away jurisdiction of other courts. Thus, in Salem Chemical Industries v. Bird & Co.8 where the terms and conditions attached to the quotation contained an arbitration clause provided that: "any order placed against this quotation shall be deemed to be a contract made in Calcutta and any dispute arising therefrom shall be settled by an arbitrator to be jointly appointed by us", it was held that it merely fixed the situs of the contract at Calcutta

and it did not mean to confer an exclusive jurisdiction on the court at Calcutta, and when a part of the cause of action had arisen at Salem, the court there had also jurisdiction to entertain the suit under Section 20(c) of the Code of Civil Procedure.

21. From the foregoing decisions it can be reasonably deduced that where such an ouster clause occurs, it is pertinent to see whether there is ouster of jurisdiction of other courts. When the clause is clear, unambiguous and specific accepted notions of contract would bind the parties and unless the absence of ad idem can be shown, the other courts should avoid exercising jurisdiction. As regards construction of the ouster clause when words like 'alone', 'only', 'exclusive' and the like have been used there may be no difficulty. Even without such words in appropriate cases the maxim 'expressio unius est exclusio alterius' - expression of one is the exclusion of another may be applied. What is an appropriate case shall depend on the facts of the case. In such a case mention of one thing may imply exclusion of another. When certain jurisdiction is specified in a contract an intention to exclude all others from its operation may in such cases be inferred. It has therefore to be properly construed.

22. Coming to clause 11 we already found that this clause was included in the general terms and conditions of sale and the order of Confirmation No. 68/59 dated 2-10-1974 with the general

terms and conditions was sent from Udyognagar, Mohmadabad, Gujarat to the respondent's address at 12 Suramangalam Road Salem, Tamil Nadu. The statement made in the special leave petition that Udyognagar, Mohamadabad, Gujarat is within the jurisdiction of the civil court of Kaira has not been controverted. We have already seen that making of the contract was a part of the cause of action and a suit on a contract therefore could be filed at the place where it was made. Thus Kaira court would even otherwise have had jurisdiction. The bobbins of metallic yarn were delivered at the address of the respondent at Salem which, therefore, would provide the connecting factor for court at Salem to have jurisdiction. If out of the two jurisdictions one was excluded by clause 11 it would not absolutely oust the jurisdiction of the court and, therefore, would not be void against public policy and would not violate Sections 23 and 28 of the Contract Act. The question then is whether it can be construed to have excluded the jurisdiction of, the court at Salem. In the clause 'any dispute rising out of this sale shall, be subject to Kaira jurisdiction' ex facie we do not find exclusionary words like 'exclusive', 'alone', 'only' and the like. Can the maxim 'expressio unius est exclusio alterius' be applied under the facts and circumstances of the case ? The order of confirmation is of no assistance. The other general terms and conditions are also not indicative of exclusion of other jurisdictions. Under the facts and circumstances of

> the case we hold that while connecting factor with Kaira jurisdiction was ensured by fixing the situs of the contract within Kaira, other jurisdictions having connecting factors were not clearly, unambiguously and explicitly excluded. That being the position it could not be said that the jurisdiction of the court at Salem which court otherwise had jurisdiction under law through connecting factor of delivery of goods thereat was expressly excluded. We accordingly find no error or infirmity in the impugned judgment of the High Court."

30. Mr.Tulzapurkar also relied upon the judgment in the case of *A.B.C. Laminart Pvt. Ltd. & Anr. v. A.P. Agencies*. In addition, he relied upon the judgment in the case of *Hanil Era Textiles Ltd. v. Puromatic Filters (P) Ltd., (2004) 4 Supreme Court Cases, 671* where, after considering the judgment in *A.B.C. Laminart Pvt. Ltd.* (supra), the Supreme Court held as under :

> "**9.** Clause 17 says - any legal proceedings arising out of the order shall be subject to the jurisdiction of the courts in Mumbai. This clause is no doubt not qualified by the words like "alone", "only" or exclusively". Therefore, what is to be seen is whether in the facts and circumstances of the present case, it can be inferred that the jurisdiction of all other courts

> except courts in Mumbai is excluded. Having regard to the fact that the order was placed by the defendant at Bombay, the said order was accepted by the branch office of the plaintiff at Bombay, the advance payment was made by the defendant at Bombay, and as per the plaintiff's case the final payment was to be made at Bombay, there was a clear intention to confine the jurisdiction of the Courts in Bombay to the exclusion of all other courts. The Court of Additional District Judge, Delhi had, therefore, no territorial jurisdiction to try the suit." (emphasis supplied)

31. Mr.Kutty, as we have seen, submitted that because words such as "alone", "only" or "exclusively" are not used in Article 39, it must be held that the parties had not agreed that the contract shall be subject to the jurisdiction of the Calcutta High Court alone. The submission is unfounded.

32. It is clear from both the judgments of the Supreme Court that the mere absence of words such as "only", "alone" or "exclusively" does not ipso facto warrant such clauses being interpreted as not conferring exclusive jurisdiction upon Courts mentioned therein. In the absence of such words, a Court must consider all the facts and circumstances

while construing the clause.

33. The Supreme Court has not prescribed any rigid formula on the basis of which such clauses are to be construed. The same must necessarily depend on the facts of each case.

34. As a defence of jurisdiction on the basis of a clause allegedly conferring exclusive jurisdiction on the Courts in a particular place, ousts the jurisdiction of the Courts in other places which would otherwise have jurisdiction, I will proceed on the basis that it is for the Defendant in the first instance to establish conferment of such exclusive jurisdiction. Needless to qualify that this approach would be unwarranted where a clause is unambigous.

35. Mr.Kutty relied upon the judgment of a learned Single Judge of the Kerala High Court in the case of *The National Starch and Chemicals v. Weikfield Products Co. (India), AIR 1990 Kerala, 291*. The judgment is of no assistance to Mr.Kutty for the clause that fell for consideration was entirely different from Article 39. The same reads as under :

> "Jurisdiction - All transactions are subject to Poona jurisdiction."

While construing this clause, it was held as under :

> 6.
> .....
> In the clause it is significant to note that the parties have not used the word 'Courts'. What is stated is 'transactions are subject to Poona jurisdiction'. An analysis of this clause would certainly imply that when the transaction is subject to Poona jurisdiction impliedly the parties agree that if there is any dispute and if it has to be settled by a Court of law, it can be a Court in Poona. This itself requires unravelling of the implication of the words 'transactions are subject to Poona jurisdiction'. After finding that the clause implicits that 'Poona jurisdiction' means Courts in Poona, further it has to be found that for excluding the jurisdiction of Courts at Trivandrum, which have got jurisdiction over the subject-matter, have lost that jurisdiction because the parties have confined the jurisdiction to settle their dispute exclusively in the Courts in Poona." (emphasis supplied)

The case therefore is clearly distinguishable

from the facts of the present case. Further, with great respect, I am unable to agree with the learned Judge, who has held inter-alia as follows :

> "5. ..... This I say because that the ouster of jurisdiction is to be found only if the Court finds that the terms excluding the jurisdiction of the Court in the agreement are unequivocal, total perfect straight and downright. It should be explicitly expressed and should be clear, peremptory definitive and decisive as to the point that the parties agreed that only in one Court and in that Court alone the dispute has to be settled."
>
> 6.....
> .....
>
> 7. In 1983 Ker LT 652 (Secretary, Vikalanga Sevaka Co-op. Society Ltd. v. Sheth Brothers) this Court said that ouster of jurisdiction must be proved by express words or by necessary or inevitable implications. By using the word 'inevitable implications' the Court is putting more emphasis on the fact that a probability or possibility of an implication is insufficient. Inevitable means a result that cannot be avoided, not admitting of escape or evasion; that cannot fail to occur. So it is said that there is no good in arguing with the inevitable - (Lowell). So the implication to oust the jurisdiction should be kismetic preordained and fatalistic. The implication itself must be definitive and decisive."

Further, the reliance upon the above extracts alone is incorrect for the learned Judge himself qualified the same by stating that even where the words are not explicit, the Court is not powerless to examine to a certain extent, to find out whether by clear implication, there is exclusion of jurisdiction.

On the basis of the aforesaid clause, the learned Judge came to the conclusion that there is no specific word excluding the jurisdiction of Trivandrum Sub Court. If by that the learned Judge meant, as by Mr.Kutty contended he did, that the clause must contain specific words such as "only" or "alone" before the Court comes to the conclusion as to the ouster of jurisdiction of Courts other than those named in the clause I respectfully disagree with the learned Judge. Such construction would, in fact, be contrary to the aforesaid judgments of the Supreme Court.

36. In the present case, the Defendant’s principal office is in Calcutta. It is for this reason that Article 43 of the contract required all

communication to be addressed to the Managing Director in Calcutta. The communication of the acceptance by the Plaintiff of the offer was required to be made in Calcutta. Article 12 of the contract required the Plaintiff to keep the Defendant informed of the progress of work by forwarding monthly status reports for the Defendant's review. Article 12 also required the Plaintiff to report immediately to the Defendant any exigencies in the work. The implementation and the execution of the contract was monitored by the Defendants from Calcutta. Even the arbitration clause requires the proceedings to take place under the jurisdiction of the Calcutta High Court. The same reads as under :

> "**ARTICLE 40 - ARBITRATION :**
>
> All unresolved disputes arising in connection with the Contract shall be resolved through an arbitrator acceptable to both the parties. In the event of failure in selecting any mutually acceptable arbitrator, arbitration proceedings will take place under the jurisdiction of Calcutta High Court.
>
> All involved parties shall abide by the findings of the Arbitrator or the verdict of arbitration by Calcutta High

> court. The terms of the Contract shall in all respects be construed and operated as a Indian contract and in conformity with Indian Laws.
>
> Performance of the Contract shall continue during Arbitration proceedings unless the Purchaser shall advise the suspension of the contract as a whole or part thereof."

37. An important question to be determined in such cases, would be the reason for the inclusion of such a clause. The Calcutta High Court and Courts situated within the territorial limit of the Calcutta High Court (for brevity referred to as the Calcutta High Court), in any event, had jurisdiction. Thus, in the present case, Article 39 was not for the purpose of conferring jurisdiction on the Calcutta High Court because the parties were of the view that otherwise the Calcutta High Court would have no jurisdiction. Parties cannot by consent confer jurisdiction upon a place or a Court which has none. I am not, however, on the question of law. I am considering what the parties had in mind when they entered into the contract. The Calcutta High Court, in any event, had jurisdiction and the parties knew, and, in any event, must be

deemed to have known the same.

38. Further, atleast three places would have jurisdiction in respect of disputes arising under the contract. The Calcutta High Court, as we have seen, has jurisdiction. If a claim was to be brought against the Plaintiff by the Defendant, the Courts in Bombay, would certainly have jurisdiction for the Defendant carries on business in Bombay. Thirdly, the place where the contract was to be performed would have jurisdiction. The goods were supplied by the Defendant from Rajasthan to the Defendants in Bellary, Karnataka.

39. Added to this is the fact that Mr.Kutty did not offer any explanation for the inclusion of Article 39. The inclusion of a term in a contract must signify something unless it is shown to have been included by mistake. It is not the Plaintiff’s case that the parties were not ad-idem or that the clause was included in the contract by mistake. It is not the Plaintiff’s case that they were unaware of Article 39 in the contract. It is not the Plaintiff’s case that the clause was inserted for a purpose other than for the purpose of conferring jurisdiction. It is not even the Plaintiff’s case

that the parties were of the view that the Calcutta High Court would otherwise have no jurisdiction and that the clause was therefore included. To reject Mr.Tulzapurkar's submission would be to render Article 39 otiose.

40. In the circumstances, the only logical explanation for the inclusion of Article 39 was to confine the jurisdiction to the Calcutta High Court and the Courts situated within the territorial limit of the Calcutta High Court, in respect of disputes arising from the contract and to exclude the jurisdiction of the Courts in any other place.

41. In the circumstances, the Chamber Summons is made absolute in terms of prayer (a).

42. I cannot however end this judgment without noting that I do not find the Plaintiff having instituted the suit in this Court even remotely for any oblique motive. I did not arrive at the conclusion I have arrived at, without effort on my part or on the part of both the counsel. In fact, considering everything, I am of the view that the suit was instituted bona-fide under a genuine, albeit mistaken, belief that this Court has

jurisdiction.

43. The order is stayed for a period of 12 weeks from today to enable the Plaintiffs to challenge the same.